Supreme Court, U.S.
FILED

No. 10-1028

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In the

Supreme Court of the United States

JAMES T. PANAGOS, LLC,

Petitioner,

v.

GINA MARIE HOUSKA,
Personal Representative of the
Estate of Jeffrey A. Houska, Deceased,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Is this state action: the enactment and enforcement of a statute that bars a creditor of one who has died from making a claim against the decedent's estate or from collecting from the decedent's personal representative, heirs, devisees, and legatees, unless the creditor files the claim in the probate court within a certain time after the decedent's death?

II

And, if so, does such a statute deprive a known or reasonably ascertainable creditor of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, by overriding the otherwise applicable statute of limitation without requiring that any notice be given to the creditor of the event that triggered the new deadline: the death of the debtor?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies and that no publicly-held company owns any interest in it.

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PETITION FOR A WRIT OF CERTIORARI

James T. Panagos, LLC respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Missouri.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri (App. 1a–9a) is reported at 323 S.W.3d 29. The rulings of the probate division of the Missouri circuit court (App. 17a–19a, 26a) are unreported.

JURISDICTION

The Supreme Court of Missouri issued its opinion on October 5, 2010. App. 1a–9a. On November 16, 2010, it denied (App. 10a–11a) a timely motion for rehearing (App. 12a–13a). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

As required by Rule 29.4(c), in that this proceeding raises questions of the constitutionality of a statute of the State of Missouri, petitioner states that 28 U.S.C. §2403(b) may apply. Accordingly, petitioner has served copies of this petition on Chris Koster, Attorney General of the State of Missouri.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part: "[N]or shall any State deprive any person of . . . property, without due process of law. . . ." U.S. Const. amend. XIV, § 1.

Mo.Rev.Stat. §516.110 (2000), is a ten year statute of limitations for "[a]n action upon any writing . . . for the payment of money. . . ."

Mo.Rev.Stat. §516.120 (2000) establishes a five year statute of limitations for "[a]ll actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110. . . ."

In pertinent part, Mo.Rev.Stat. §473.444.1 (2000), provides as follows:

> [A]ll claims against the estate of a deceased person . . which are not filed in the probate division . . . shall become unenforceable and shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent one year following the date of the decedent's death . . . whether or not during such period a claimant has been given any notice, actual or constructive, of the decedent's death or of the need to file a claim in any court. . . .

A full consideration of the issues may require reference to Mo.Rev.Stat. §§473.033 and 473.360.1

(2000), the pertinent provisions of which are reproduced in the Appendix at 31a–33a.

STATEMENT

Petitioner furnished electrical labor and materials for a home which respondent's father, Jeffrey Houska, was building. App. 2a. Petitioner gave Houska his invoice; a week later, on November 2, 2006, Houska died without having paid Panagos. *Id.*

Respondent, Houska's daughter, was appointed as the personal representative of his estate, and, on May 11, 2007, first published a notice to advise creditors of the opening of the estate and of the beginning of the six-month period[1] within which to file claims. App. 2a, 18a. Except for this notice, published in a legal newspaper, respondent never notified petitioner of decedent's death or of the opening of a probate estate. App. 2a, 21a, 24a–25a.

About two years later, on May 5, 2009, petitioner filed a claim against the estate. App. 2a, 28a–30a. On motion of respondent (App. 27a), without notice and without a hearing (App. 20a–21a ¶2), the probate court dismissed petitioner's claim as untimely under the six-month-from-the-date-of-first-publication nonclaim statute, Mo.Rev.Stat. §473.360 (App. 33a), and the one-

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[1] This six month period, which begins on the date on which notice of the decedent's death and of the issuance of letters testamentary or letters of administration is first published (*See* Mo.Rev.Stat. §473.033 (2000) (App. 31a–32a)), is established by the Missouri nonclaim statute, Mo.Rev.Stat. §473.360 (2000) (App. 33a).

year-from-the-date-of-death statute of repose, Mo.Rev.Stat. §473.444 (*supra*, p. 2). App. 26a.[2] Petitioner sought a rehearing, alleging that he was a reasonably ascertainable creditor, that he had received no actual notice of the commencement of probate proceedings, and that the dismissal of his claim under the nonclaim statute violated his rights of due process, as held in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988). App. 20a–25a.

The probate court ruled petitioner's motion for rehearing as follows:

> The issue is controlled in part by the Supreme Court decision of *Tulsa Professional Collection v. Pope*, 485 U.S. 478 (1988). The question becomes whether the Administrator [personal representative] knew or by the use of reasonable diligence would have been aware that Claimant was a creditor of the Estate. . . .

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[2] Courts and commentators have used a variety of names to describe these two kinds of statutes: nonclaim statutes, probate statutes of limitations, statutes of repose, short-term probate statutes of limitations, long-term probate statutes of limitation, short-term nonclaim statutes, and long-term nonclaim statutes. Professor Reutlinger's suggested terminology to describe a statute that is triggered by notice of the commencement of probate is a "nonclaim statute." He uses the term "probate statute of repose" to describe a statute which cuts off all claims within a certain period after the decedent's death. Mark Reutlinger, *State Action, Due Process, and the New Nonclaim Statutes: Can No Notice Be Good Notice If Some Notice Is Not?*, 24 Real Prop. Prob. & Tr. J. 433, 435, fn. 6 (1990). Petitioner adopts this terminology, as it contributes to clearer analysis of the state action and due process issues.

> The matters filed by Claimant at least raise the question of whether the standards applied in *Pope* have been met. The Order dismissing the claim is set aside. The Claim is reinstated. The parties are free to conduct such ever discovery as they choose, on the issues raised in the *Pope* case. . . .

App. 17a–19a (*italics* added, footnote omitted).

Respondent sought and obtained interlocutory review of this ruling in the Missouri Supreme Court.

In the Missouri Supreme Court, respondent conceded that petitioner might have been entitled to actual notice under the Missouri probate nonclaim statute, a statute that sets deadlines measured from the date of published or actual notice of the decedent's death and of the opening of an estate (*See* Mo.Rev.Stat. §473.360 (App. 33a) and form of notice Mo.Rev.Stat. §473.033 (App. 31a–32a)). App. 2a–3a, fn. 2.

Thus, the court focused its attention on the question of whether "section 474.444 violates due process because it bars most creditors' claims against an estate that are brought more than one year after a decedent's death and does not require the estate to give creditors actual notice of the probate proceedings." Mo.S.Ct. Opinion, App. 3a–4a (footnote omitted).

Noting that there must be state action before there can be a violation of the Due Process clause of the Fourteenth Amendment, the court reviewed this Court's opinion in *Pope*. *Id.*, App. 5a-7a. It observed that *Pope* distinguished the Oklahoma nonclaim statute from a "self-executing statute of limitation."

App. 6a–7a. The court concluded:

> [S]ection 473.444 is self-executing. . . . [It] does not involve sufficient state involvement to implicate due process protections. . . . [It] operates independently of any notice, judicial action or jurisdiction of the probate division to bar claims. The trial court is not 'intimately' involved with the application of the one-year limitation. . . . No state action is required to trigger the one-year period; the decedent's death automatically triggers the time period. Because section 473.444 is self-executing, Panagos' due process claim fails.
>
> A one-year limitation is needed to promote the speedy and efficient settlement of estates. The state has an interest in 'providing repose for potential defendants and in avoiding stale claims.' *Pope*, 485 U.S. at 486. Section 473.444 facilitates prompt closure of estates and still gives creditors one full year to bring claims.

Id., (citations and footnotes omitted). App. 7a–8a .

The probate court first dismissed Panagos' claim without notice or a hearing. App. 20a–21a ¶2, 26a–27a. In seeking a rehearing of respondent's motion to dismiss, petitioner asserted that, because it was a known or reasonably ascertainable creditor, and because respondent had not given it actual notice of the opening of an estate, the dismissal of its claim was

a denial of its rights of due process, as guaranteed by the Constitution of the United States; it referred the probate court to this Court's decision in *Pope*. App. 20a–25a. It renewed this argument in the Missouri Supreme Court, both prior to the court's issuance of its opinion and in its motion for rehearing. App. 4a, 12a–16a.

REASONS FOR GRANTING THE PETITION

In characterizing the legislature's enactment and the court's enforcement of a statute that cuts off all claims against the estate of one who has died, if not filed within a stated period of time following the death, as insufficient state action to implicate the due process guarantee of the Fourteenth Amendment, the Missouri Supreme Court has decided an important federal constitutional question in a way that misinterprets this Court's opinion in *Pope* and overlooks other of this Court's pertinent opinions.

In that thirty-two other states, territories, and other American jurisdictions have a similar statute,[3] this is an issue of national importance. The few other federal and state courts that have confronted this issue have also read *Pope* too expansively.[4] They have relied on *Pope*'s *dicta* and have failed to apply proper constitutional analysis to these statutes.

Thus, this is an important constitutional question that this Court recognized but did not decide in *Pope*

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[3] *See Infra* pp. 26-28.

[4] *See Infra* pp. 22-26.

and that now should be settled by this Court to provide definitive and final guidance on this issue.

A. The Missouri Supreme Court Erred in Concluding that the Legislature's Enactment and the Court's Enforcement of a Probate Statute of Repose is Not State Action.

1. State Action

Instead of a rigorous analysis of the two principal issues, state action and what process is due, the court focused its attention on one phrase from *Pope*: "a self-executing statute of limitations." *Pope* used the phrase in its state action analysis to describe a type of statute that might involve the government too little to implicate the Due Process Clause. *Pope*, 485 U.S. at 485-88 (*dictum*). The court concluded that Section 473.444 is such "a self-executing statute of limitations. . . ." App. 7a.

But, the court failed to carefully examine the two aspects of this premise. Is this a statute of limitations? If so, is it self-executing. And, it failed to examine the underlying assumption. Even if it is a self-executing statute of limitation, is there sufficient state action to implicate the constitutional guarantees of due process?

A methodical analysis must begin with a more general consideration of the concept of state action.[5]

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[5] The state action doctrine has never been clearly defined and has spawned much confusion. Julie K. Brown, Note, *Less is More: Decluttering the State Action Doctrine*, 73 Mo.L.Rev. 561, 562, 581 (2008)(footnotes omitted)(*quoting*, John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C.L. Rev.

2. *Tulsa Professional Collection Services v. Pope*

Without referring to any particular test or rule, *Pope* confronted the question of whether there was

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569, 575 (2005), Kevin L. Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 Ga.L.Rev. 327, 343 (1990), and Charles L. Black, Jr., Forward: *"State Action," Equal Protection and California's Proposition 14*, 81 Harv.L.Rev. 69, 95 (1967)). *See also, e.g.*, Lawrence H. Tribe, *American Constitutional Law* §18-1 at 1690 (2d ed. 1988)("[D]espite the precedents, and despite the vocabulary, the Supreme Court has not succeeded in developing a body of state action 'doctrine,' a set of rules for determining whether governmental or private actors are to be deemed responsible for an asserted constitutional violation."); *Reutlinger, supra* note 2 on p. 4, at 442-56 ("The Supreme Court itself has despaired of ever reaching a coherent and consistent definition of state action and it appears to proceed historically on a case-by-case basis, following only vaguely those rare patterns and precedents that emerge from time to time." *Id.* at 443 (footnotes omitted)).

Rejecting the notion that the state action cases reveal any general rule, Professor Tribe calls state action an "anti-doctrine." Tribe, *supra*, §18-1 at 1691. He explains that the best way to understand it is simply as a way of expressing the boundary of the activities to which the Court believes the Constitution ought to apply. Tribe, *supra*, §18-7, at 1720. Similarly, some commentators have suggested that, "under the guise of a formulistic search for an undefined minimum amount of state acts" what the Supreme Court has really done is to employ a balancing test: "[w]hen the harm to protected rights outweighed the value of the challenged practice, the Court has found sufficient state action, which made easy a final ruling of unconstitutionality." Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, Volume 2, §16.5 at 196-97 (3d ed. 1999). *Cf.* Reutlinger, *supra* note 2 on p. 4, at 448 ("[S]tate action may be found if the court or its dissenters wish to reach the merits of the underlying constitutional issue, and may be missing if they do not." *Id.* (footnotes omitted)).

state action in the enactment and application of a probate nonclaim statute. *Pope*, 485 U.S. at 479-94.

The Court noted that most states had two nonclaim statutes, one that provided a short period for filing a claim after the commencement of probate proceedings and another that allowed a longer period that ran from the date of the decedent's death. *Pope*, 485 U.S. at 480.[6],[7] But, Oklahoma had only the first type.[8] *Id.* at 481. It required only notice by publication and provided that creditors must present their claims within two months of the date of first publication of that notice. *Id.*

The decedent's wife initiated probate proceedings in an Oklahoma court, was appointed by that court as the executrix of the estate, and published a notice in a legal newspaper. *Id.*, 485 U.S. at 482. After the two-month nonclaim period had passed, a creditor sought payment from the estate. *Id.*, 485 U.S. at 482-83. The trial court ruled that the creditor's claim was untimely. *Id.*

The Court began its analysis by observing that the

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[6] It observed that, at that time, Missouri had such a dual approach, *citing* "Mo.Rev.Stat. §§ 473.360(1), (3), (six months; three years)." *Id.*

[7] See note 2 on p. 4 above. To avoid confusion, Professor Reutlinger suggests that such statutes be called a "nonclaim statute," and "a probate statute of repose," respectively. Reutlinger, *supra* note 2 on p. 4, at 435, fn. 6.

[8] For this reason, *Pope's* discussion of the type of statutes that run from the date of death, probate statutes of repose, is *dictum*. It is principally upon this *dictum* that the court based its decision.

creditor's claim against the estate was a type of property, an intangible interest, that is protected by the Fourteenth Amendment. *Id.*, 485 U.S. at 485. It explained that "[t]he Fourteenth Amendment protects this interest, however, only from a deprivation by state action." *Id.* It observed that the enactment of a statute of limitations "obviously is state action." *Pope*, 485 U.S. at 486-87. But, in *dictum*, the Court said that the mere enactment of a statute of limitations "falls short of constituting the type of state action required to implicate the protections of the Due Process Clause." *Id.* It elaborated:

> [w]hen private parties make use of state procedures with the overt, significant assistance by state officials, state action may be found. The question here is whether the State's involvement with the nonclaim statute is substantial enough to implicate the Due Process Clause.

Id., 485 U.S. at 486 (citations omitted).

Reviewing the procedural history of the case, the Court recounted that the Supreme Court of Oklahoma had rejected the creditor's contention that *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) rendered the Oklahoma statute's notice provision, which required notice by publication only, a violation of due process. *Pope*, 485 U.S. at 483. Pope's executrix argued that Oklahoma Supreme Court's rationale was correct and cited *Texaco, Inc. v. Short*, 454 U.S. 516 (1982).

Though the Court conceded that nonclaim statutes

"possess some attributes of statutes of limitations," and, in *dictum*, it said that it is the "'self-executing feature' of a statute of limitations that makes *Mullane* and *Mennonite* inapposite," it concluded that the Oklahoma statute was "not a self-executing statute of limitations. . . ." *Id.*, 485 U.S. at 486-88.

While it did not fully explain what was needed in order to fairly describe a statute of limitations as "self-executing," in evaluating the nonclaim statute, it focused on what it described as the "substantial involvement of the probate court" in the claims process, including the triggering of the time limit for the filing of claims, the publication of notice, and the filing of the notice and affidavit of notice. *Id.*, 485 U.S. at 486-88. It concluded that "the running of Oklahoma's nonclaim statute is accompanied by sufficient government action to implicate the Due Process Clause." *Id.*, 485 U.S. at 488. In his dissent[9] in *Pope*, Chief Justice Rehnquist contended that it was "out of context and contrary to common sense" to describe a statute as "self-executing," unless there is no "judicial or other determination that itself extinguishes the claimant's rights." *Pope*, 485 U.S. at

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[9] Justice Rehnquist's wrote that the determination of whether notice is required turns not upon whether the statute can be described as "self-executing," but, rather, upon the level of court involvement. He argued that the Oklahoma court's involvement in the probate process, triggering the start of the non-claim statute, was too perfunctory to rise to the level of state action, and, so, to give rise to the notice requirements of the Due Process Clause. *Id.*, 485 U.S. at 494. Even so, his use of the term "self-executing" is persuasive. The Missouri probate statute of repose, Section 473.444, cannot be described as "self-executing" in the sense understood by Justice Rehnquist, because a claim is not extinguished unless and until a court rules that it was filed too late.

494.

Once it determined that there was state action, the Court considered whether the Due Process Clause required any notice to creditors before the nonclaim statute's bar could take effect. *Pope* held that termination of a known or reasonably ascertainable creditor's claim without actual notice violates due process. *Id.*, 485 U.S. at 491. Implicit in its holding is that it employed a balancing test is reaching this conclusion: "a requirement of actual notice to known or reasonably ascertainable creditors it not so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted. *Id.*, 485 U.S. at 490.

3. Section 473.444 Is Not a Statute of Limitations

The Missouri Supreme Court concluded that *Pope* has no application to Section 473.444, because, it is a "self-executing statute of limitations." App. 7a. This is both a misleading description of the statute and a misreading of *Pope*.

The court's conclusion is infected by its erroneous and misleading characterization of Section 473.444 as a "statute of limitations." It is not a "statute of limitations" as that phrase is ordinarily used and understood:

> A statute of limitation precludes suit after the passage of a legislatively imposed number of years following the accrual of a cause of action, while a statute of repose bars suit for a specified number of years after the occurrence of

> a particular event without regard to the date of the accrual of a cause of action.

Magee v. Blue Ridge Professional Building Co., 821 S.W.2d 839, 845 fn. 3 (Mo. banc 1991)(citations omitted). *Accord Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 834 (Mo. banc 1992). Because Section 473.444 cuts off a claim if it is not filed within one year of the decedent's death, regardless of when it accrued, it is better described as a statute of repose. *Id. Cf.* Reutlinger, *supra* note 2 on p. 4, at 435, fn. 6 ("it is more in the nature of a repose statute.")(citations omitted). *But see, e.g., Hatfield v. McCluney*, 893 S.W.2d 822, 825-26 (Mo. banc 1995)("§§ 473.360 and 473.444 are separate statutes of limitations." *Id.* at 826).

4. *Pope Dicta*

Pope never characterized nonclaim statutes that are triggered by a decedent's death, rather than by the publication of notice of the commencement of probate proceedings, as self-executing. *Pope*, 485 U.S. at 488. It also never said that its analysis might not also apply to such statutes:

> The Court did not consider whether the operation of a probate statute of repose [such as §473.444] is the mere running of a statute of limitations or whether it sometimes might be sufficient to implicate due process. The Court simply had 'no occasion to consider the proper characterization of nonclaim statutes that run from the date of death. . . .'
>
> . . . .

> It is clear that the majority did not hold that all self-executing statutes of limitation are free of due process implications or that probate statutes of repose necessarily are such statutes.

Reutlinger, *supra*, note 2 on p. 4, at 441-42 (*quoting Pope*, 485 U.S. at 488). So, *Pope*'s remark that "the State's involvement in the mere running of a general statute of limitations [is not] generally sufficient to implicate due process" is *dictum*. *Pope*, 485 U.S. at 485-86. It is *dictum*, because the Court never said that the Oklahoma nonclaim statute at issue in *Pope* was a "general statute of limitations." *Pope*, 485 U.S. at 486. It said only "that nonclaim statutes generally possess some attributes of statutes of limitations." *Id.*, 485 U.S. at 486.

While *Pope* did not define the term "self-executing," it referred to *Short*, 454 U.S. at 516, as an example of a statute that could be so described. *Pope*, 485 U.S. at 485-88.

Short considered an Indiana statute which provides "that a mineral interest that is not used for a period of twenty years automatically lapses and reverts to the current surface owner of the property, unless the mineral owner files a statement of claim in the local county recorder's office." *Id.* at 518 (footnote omitted). The Court observed that the owner of a mineral interest is presumed to know this law. *Id.* at 533. It analogized this Mineral Lapse Act with a "self-executing statute of limitations" in holding that the Due Process Clause did not require the surface owner to give notice to the mineral owner that mineral owner's interest was soon to lapse. *Id.* at 536 and 531-40. It elaborated: "The Due Process Clause does not

require a defendant to notify a potential plaintiff that a statute of limitations is about to run. . . ." *Short*, 454 U.S. at 536 (*dictum*).

Short never discussed the threshold issue of state action. *Id.*, 454 U.S. at 531-38. Instead, the Court simply decided, that, under the circumstances presented, the Due Process Clause did not require any notice. *Id.* *Short* can best be understood this way. Where all affected parties know or should know the facts which trigger the deadline, due process does not require one party to send the other a reminder that its rights will soon terminate. This is not the result of state action analysis, but rather it is simply a balancing of interests in determining what process is due.

The situation in *Short* bears no resemblance to that of the case at bar. Respondent seeks to defeat Panagos' claim based on the expiration of a deadline triggered by an event, the death of her father, known, perhaps,[10] only to her. This is the event, the Missouri Supreme Court has held, that transformed the legal relationship between debtor and creditor, shortening the general statute of limitations that otherwise would have governed Panagos' claim. Mo.Rev.Stat. §516.120 (five years for actions on contracts, express or implied) (*supra*, at 2); Mo.Rev.Stat. §516.110 (ten years on written contract for the payment of money) (*supra*, at 2).

This difference between a statute of limitation and

---

[10] The record before this court does not clearly establish when Panagos learned of the decedent's death; rather, it establishes only that he received no notice of the death and of the institution of probate proceedings. App. 25a, ¶¶'s 7 and 8.

probate statute of repose, such as Section 473.444, was noted in Brian J. Doherty, Comment, *Notice and the Missouri Probate Nonclaim Statutes: The Lingering Effects of Pope*, 59 Mo.L.Rev. 187, 207 (1994):

> in the situation of typical statutes of limitation, the event that triggers the running (commencement) of the statute is or should be known to the person affected, the potential plaintiff or claimant. For example, a party to a contract that has been breached is generally aware of the breach that causes the statute of limitations to start running. Therefore, no notice is required for typical statutes.
>
> On the other hand, the situation is different for a probate claim. In that case, the creditor is not usually aware of the decedent's death, but the decedent's death is what causes the running of the statute [such as Section 473.444]. Because the running of the statute is triggered by an event a creditor will not likely be aware of, notice to the creditor of the decedent's death should be required to satisfy due process.

Id., (citations and internal quotation marks omitted). For this reason, both *Short* and the *Pope dicta* about "self-executing statues of limitations" are inapposite.

5. *Pope*'s Antecedents

a. The Foundation of *Pope*'s Due Process Notice Analysis

A full understanding of *Pope* and a fair assessment of how it applies to the Missouri probate statute of repose, Section 473.444 (*supra* p. 2), requires the examination of the due process cases upon which it was based. In addition to *Short*, *Pope* relied on *Mullane*, 339 U.S. at 314, *Mennonite*, 462 U.S. at 791, *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), *City of New York v. New York, N.H. & M.R. Co.*, 344 U.S. 293 (1953), *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), and *Schroeder v. City of New York*, 371 U.S. 708 (1962).

b. Government Actors

In those cases where the challenged action was that of some unit of government, *Mennonite*, 462 U.S. at 792-95 (county), *Logan*, 455 U.S. at 424-44 (state commission), *New York, N.H. & M.R. Co.*, 344 U.S. at 294-97 (city), *Craft*, 436 U.S. at 3-21 (municipal utility), and *Schroeder*, 371 U.S. at 208-14 (city), the Court did not address the requirement of state action. Instead, it simply considered what kind of notice was constitutionally required. *Id.*

c. Private Actors

In *Pope* and the other cases in which the challenged conduct was initiated by a private actor, *Pope*, 485 U.S. at 479-91 (executrix of estate), *Mullane*, 339 U.S. at

313-20 (trust company), *Short*, 454 U.S. at 518-540 (landowner), *Flagg Brothers*, 436 U.S. at 151-66 (warehouseman), *Lugar*, 457 U.S. at 923-944 (creditor), and *Sniadach*, 395 U.S. at 337-42 (creditor), the Court only touched on state action in three cases.

In *Mullane*, *Short*, and *Sniadach*, it simply addressed the question of what kind of notice was constitutionally required. In each of these cases, private persons sought to employ court procedures to determine the property rights of others. In *Mullane*, 339 U.S. at 307-320, the trustee sought court approval of its accounting, so that the trust beneficiaries would be bound. In *Short*, 454 U.S. at 518-40, a landowner sought a declaratory judgment that the rights of mineral interest owners had lapsed. In *Sniadach*, 395 U.S. at 337-42, a creditor employed court procedures to garnish a debtor's wages prior to judgment.

In the remaining cases, the Court confronted the state action requirement head on, finding sufficient governmental involvement to require due process in two of the three cases: *Pope*, 485 U.S. at 479-91, and *Lugar*, 457 U.S. at 923-43, and failing to find state action in only one, *Flagg Brothers*, 436 U.S. at 151-66.

Pope found state action in the involvement of the probate court in, among other things, appointing the executrix and in directing her to publish notice of the opening of the estate. *Pope*, 485 U.S. at 487-88.

Lugar held that the sheriff's pre-judgment attachment of a debtor's property at the request of the creditor, employing state-created procedures, was state action. *Lugar*, 457 U.S. at 941-42.

Only in *Flagg Brothers* did the Court not find state

action. The Court held that a warehouseman's threatened private sale of bailed goods to satisfy unpaid storage charges, as permitted but not required by statute, was not the action of the state; accordingly, it was not subject to the constitutional protection of due process. *Id.*, 436 U.S. at 156-66. It noted that there was a "total absence of overt official involvement" in the warehouseman's sale. *Flagg Brothers*, 436 U.S. at 157, and 151-66.

The rule that the holdings in these cases suggests is that where the machinery of government is employed by a private party to determine the property rights of another party, there is state action and the protections guaranteed by the Due Process Clause of the Fourteenth Amendment must be afforded. It is just such machinery of government that respondent seeks to employ in obtaining a judicial determination that Panagos' claim is time-barred and that she and her brother are entitled to distribution of the estate's assets free from all claims. App. 27a.

d. The "Self-Executing" Fallacy

The court used its characterization of the probate statute of repose as "self-executing" to suggest that somehow this makes it "impervious to due process analysis." Reutlinger, *supra*, note 2 on p. 4, at 452. As Professor Reutlinger explains in his exhaustive and persuasive analysis, this conclusion:

> is wrong on two counts. It is wrong because such a statute is not self-executing in the sense that the statute in *Flagg Brothers* might have been. And it is wrong because self-executing in the sense later used in *Texaco* [, *Inc.*

> *v. Short*] goes to the question whether due process has been violated, not to any issue of state action. Thus, an analysis is required of the merits of the issue: does elimination of notice for a probate statute of repose violate due process?

Id.

Professor Reutlinger explains that in a probate statute of repose, the state is far more deeply implicated in the deprivation of property than it was in simply permitting, but not compelling, the warehouseman in *Flagg Brothers* to conduct a private sale of bailed goods. *Id.* at 448. Unlike the situation in *Flagg Brothers*, the state statute has not simply offered the parties the right to make a choice as to how they might wish to resolve any breach of contract. Instead, "it has mandated that *all* claims be cut off, regardless of any action or inaction by any private party." *Id.* The state is not a passive party, merely allowing the parties to enforce some private agreement. It is actively engaged in setting the time limit for the presentation of claims and in "enforc[ing that time limit] by denying a remedy that, but for the statute, the parties would have [had]." *Id.* at 449.

Not only is the state much involved in this deprivation of property, contrary to the court's conclusion, Professor Reutlinger contends that there is even more state action in this case than there was in *Pope*:

> Once it is conceded that there is a deprivation of property cutting off a creditor's clam, which *Pope* makes clear,

> it seems logical to assume that someone is responsible for that deprivation. If the state did not, by direct action, cut off the creditor's claim before it otherwise was due to end, then who did? The state is more involved here than in the case of a typical short-term nonclaim statute, which *Pope* held to be state action. Although the probate court is involved in the opening of probate or the issuance of an order to publish, it is really the action of the personal representative that triggers the running of the short-term statute and, if interested individuals decided not to probate the will or otherwise open administration proceedings, the nonclaim period does not commence to run. Yet in the case of a probate statute of repose, no such "private" action is required to execute the state's mandated cutoff of the creditor's claim.

Id. (footnotes omitted). And, there is far more governmental involvement than the conduct which the Court, in *Shelley v. Kraemer*, 334 U.S. 1 (1948), held was state action: court enforcement of a private agreement, a racially-restrictive real estate covenant.

So, taken together, the state's enactment of the probate statute of repose and its enforcement of the statute by denying a late-filed claim is state action. *Id.* at 451-52, 443-52.

B. Decisions of Other States

The court asserts that its analysis that Section

473.444 is "self-executing" is supported by all other states which have considered this question. While, apparently, this is true, the opinions which it cites are marred by their uncritical application of *Pope dicta* to their analyses and, in some instances, by a complete lack of analysis.

The court cites *Denver Water Department Credit Union v. The Estate of Ongaro*, 998 P.2d 1097, 1105 (Colo. banc 2000), a case that characterized the Colorado statute that cuts off all claims, without notice, one year after death as "self-executing." *Ongaro* insisted that the statute is "a nonclaim statute, not a statute of limitations." *Ongaro*, 998 P.2d at 1102. But, it failed to acknowledge the key difference between such statutes: the claimant's awareness of the event that starts the clock. *Ongaro*, 998 P.2d at 1105-06. It never mentioned the requirement of state action. *Id.* Instead, it paraphrased and confused *Pope*'s *dictum* about the state's involvement in the running of a statute of limitation being insufficient state action to implicate the constitutional right to due process. *Id.* It relied on this *dictum* and, also, without any analysis, on *Flagg Brothers*, 436 U.S. at 149, to uphold its statute from constitutional attack. *Id.* *Ongaro*, 998 P.2d at 1105-06. For all these reasons, it is unpersuasive.

In *Estate of Decker v. Farm Credit Services*, 684 N.E.2d 1137 (In. 1997), without any analysis of state action or explanation of its reasoning, the court held that the Indiana one-year-from-the-date-of-death statute of repose[11] was "self-executing," and, so, unaffected by *Pope*. *Decker*, 684 N.E.2d at 1139. This

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[11] It held that this provision was not a statute of limitations. *Decker*, 684 N.E.2d at 1137-39.

superficial consideration ought to be given little weight.

It also cites *Ohio Casualty Insurance Company v. Hollowell (In Re Estate of Auguste)*, 94 Md.App. 444, 617 A.2d 1134 (1993). Unlike *Ongaro* and *Decker*, *Hollowell* included a somewhat detailed analysis of *Pope*; and, it offered some explanation for its conclusion that *Pope* does not invalidate a nine-months-from-death statute of repose which requires no notice to creditors. Even so, *Hollowell* is unconvincing for many of the same reasons as *Ongaro* and *Decker*. It failed to look at the "self-executing" label in the wider context of both state action and due process. *Hollowell*, 617 A.2d at 1136-38. It never attempted to explain how this statute of repose, triggered by an event about which a creditor might be ignorant, could be equated with a "self-executing statute of limitations" that is triggered by events of which the plaintiff is or should be aware. *Id.*

The court in *Burnett v. Vallaneuve*, 685 N.E.2d 1103, 1111, fn. 9 (Ind.App. 1997), another case cited by the court, quoted *Pope dicta* and concluded that the one-year-from-death statute was a "self-executing nonclaim statute" which did not implicate the Due Process Clause. *Id.*, at 1111-12. It failed to look at the wider picture of what is state action, at why the enactment of the nonclaim statute and its judicial enforcement do not amount to state action, and why a statute whose time deadline is triggered by some fact possibly known to only one of two litigants can be fairly analogized to the self-executing statutes of limitations mentioned in *Pope dicta*.

The court also cites *Roddy v. Hamilton County Nursing Home (In re Estate of Key)*, No. 03A01-9810-

CH-00319, 1999 WL 172675 (Tenn. Ct. App., Mar. 24, 1999), 1999 Tenn.App. LEXIS 201, which held that *Pope* had no application to Tennessee's one-year-from-the-date-of-death probate statute of repose. Without any analysis, the court simply announced its conclusion, calling the provision a "self-executing statute of limitations. . . ." *Id.*, WL at *5. *Roddy* should be given little weight, not only because it never addresses why such a statute can be considered a statute of limitations or the wider context of the constitutional requirement of state action, but also because it is factually distinguishable. *Id.*, WL at *1-5. Unlike Panagos, in *Roddy*, the creditor learned of the death soon after it occurred. *Id.*

Another case which the court cites, *Society National Bank v. Johnson*, No. 72002, 1997 WL 781741 (Ohio App. 8 Dist., Dec. 18, 1997), 1997 Ohio App. LEXIS 5682, is distinguishable for the same reason: the creditor learned of the decedent's death within two months of its occurrence and ten months before the cut-off date for making a claim. *Id.*, WL at *5. The court's analysis of *Pope* is flawed, because it reflexively characterized its statute as "a self-executing statute of limitations. . ." without a careful consideration of whether it is a statute of limitation and of the broader issues of state action addressed in *Pope*, and of those cases upon which *Pope* relied. *Id.*, WL at *4-5.

Fifth Third Bank v. Gottlieb, No. WD-96-054, 1997 WL 543069 (Ohio App. 6 Dist., Aug. 29, 1997), 1997 Ohio App. LEXIS 3815, another case cited by the court, is unconvincing in refusing to invalidate the Ohio one-year-from-death bar. It called the law "a self-executing statute of limitations" without recognizing the difference between a statute of repose and a statute of limitation. *Id.*

After the Missouri Supreme Court handed down its opinion, a federal district court upheld Florida's similar probate statute; it stated that because it "is a self-executing statute of repose that is triggered by a decedent's death, it does not involve significant state action or implicate the due process concerns addressed in [*Pope*]." *Grijalva v. Gulf Bank*, No. 09-22375-CIV (S.D. Fla. Jan. 25 2011)(available on Westlaw at 2011 WL282754, see p. 3). Other than the single sentence quoted above, the court offered no analysis of the constitutionality of the statute, and so, its superficial analysis is most unpersuasive. *Id.*

None of these opinions appear to recognize that a creditor of a decedent might not be aware of the decedent's death. None appreciates that, for this reason, a probate statute of repose is not the equivalent of a usual statute of limitation. This oversight robs each of these opinions, which more or less reflexively characterize such statutes as "self-executing," of any analytical clarity and persuasiveness.

A careful study of *Pope* suggests that the "self-executing" label cannot fairly be applied to such a statute of repose, so that there is, indeed, state action in the legislature's enactment and the court's enforcement of such a statute.

C. Many American Jurisdictions Have Comparable Statutes

The adoption of a similar probate statute of repose in more than half of the states and other American jurisdictions, from Alaska to the Virgin Islands, from Maine to the Commonwealth of the Northern Marianna Islands and many places in between, makes

this constitutional question one of national significance.

Like Mo.Rev.Stat. §473.444, the Uniform Probate Code §3-803(a), 8 Part II, U.L.A. 215 (1998 and supp. 2010) is a statute of repose that trumps the otherwise applicable statute of limitations to cut off the right of a creditor to seek to recover from a decedent's estate, personal representative, heirs, and devisees, if he fails to present his claim within one year of the decedent's death. Seventeen states and the Territory of the Virgin Islands have adopted this provision in substance, with various modifications.[12]

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[12] Alaska Stat. §13.16.460(a)(2) (West 2007)(three years after death if no published notice); Colo.Rev.Stat. §15-12-803(1)(a)(III) (West 2005, supp. 2010)(one year after death); Fla. Stat. ch. 733.710(1) (West 2010)(two years after death); Haw. Rev. Stat. §560:3-803(a)(2) (LexisNexis 2010)(eighteen months after death if notice is not given); Idaho Code §15-3-803(a)(1) (2009)(three years after death); Me. Rev. Stat. Ann. tit. 18-A §3-803(a)(2) (1997, supp. 2010)(within nine months of death); Mass. Gen. Laws ch. 190B §3.803(a) (West 2004)(one year after death); *but cf.* Mass. Gen. Laws ch. 197 §10 (nevertheless, some relief may be available upon a bill in equity); Mich. Comp. Laws §700.3803(1)(c) (West 2002, supp. 2010)(three years after death); Minn. Stat. Ann. §524.3-803(a)(3) (West 2002, supp. 2010)(one year after death regardless of "whether or not notice to creditors has been published or served. . . ."); Mont. Code Ann. §72-3-803(1)(a) (2010)(one year after death); Neb. Rev. Stat. §30-2485(a)(2) (2008, supp. 2009)("three years after the decedent's death if notice to creditors has not been given. . . ."); N.J. Stat. Ann. §3B:22-4 (West 2007)(nine months after death); *but, cf.* N.J. Stat. Ann. §3B:22-10, *et seq.*(there are limited remedies for late filed claims against the personal representative, and against the heirs' refunding bonds); N.M. Stat. Ann. §45-3-803(A)(3) (1978, supp. 2008)(one year after death); N.D. Cent. Code §30.1-19-03 (3-803)(1)(b) (2010)("three years after the decedent's death, if notice to creditors has not been published and mailed."); S.C. Code Ann. §62-3-803(a)(1) (1987, supp. 2007)(one year after death); S.D. Codified Laws §29A-3-803(a)(3) (2004)(three years after death);

Though it has adopted the Uniform Probate Code, Arizona has avoided the due process problem created by the U.P.C.'s suggested probate statute of repose by requiring written notice to be mailed or delivered to all known or reasonably ascertainable creditors and by providing that the time for filing a claim does not end until actual or published notice has been given. Ariz. Rev. Stat. §§14-3801 and 14-3803.A.1 (2005).

Eight other states and the Commonwealth of the Northern Mariana Islands have probate statutes of repose which, like Missouri's, bar a creditor from recovery, even if the creditor has received no notice of the death and of the opening of a probate estate, after a period of time measured from the date of death.[13]

Five other states take a slightly different approach; they bar a creditor from asserting a claim against a decedent's estate or heirs unless the creditor or

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Utah Code Ann. §75-3-803(1)(a) (LexisNexis 1993, supp. 2010)(one year after death); V.I. Code Ann. tit. 15, §3-803(a)(1) (1996, supp. 2010)(one year after death).

[13] Del. Code Ann. tit. 12 §2102(a) (2007)(claims "are barred against the estate, the personal representative and heirs and devisees . . . unless presented . . . within 8 months of the decedent's death whether or not the notice . . has been given"); Ch. 755 Ill. Comp. Stat. 5/8-12(b) (2008)(two years after death); Ind. Code Ann. §29-1-7-7(e) (West 2010)(nine months after death); Md. Code Ann. Est. & Trusts §8-103(a)(1) (LexisNexis 2001)(six months after death); Ohio Rev. Code Ann. §2117.06(c) (LexisNexis 2007)(six months after death); Tenn. Code Ann. §30-2-307(a)(1)(B) (LexisNexis 2007)(twelve months after death); Vt. Stat. Ann. tit. 14, §1203(a)(2) (2002)(three years after death); Wash. Rev. Code Ann. §11.40.051(1)(b)(ii) and (c) (West 1998, supp. 2010)(twenty-four months after death); 8 N. Mar. I Code §2924(a)(2) (2004)(claims barred if not presented "[w]ithin three years after the decedent's death, if notice to creditors has not been published.").

someone else seeks letters of administration or letters testamentary within a certain period of time beginning on the date of the decedent's death.[14]

D. Due Process Requires Actual Notice To Those Creditors Who Are Known or Are Reasonably Ascertainable

Once the threshold of state action is crossed, we must consider what process is due.

The opinion appears to be untroubled by a situation that defies the most basic notions of fairness. Would anyone believe that it would be fair for the referee at a Washington Redskins vs. Dallas Cowboys football game to tell the Cowboys that the game will be over in five minutes, though the game clock shows ten, without also telling the Redskins squad? Yet, the opinion approves the use of this statute to change the rules of the game in the middle of the game without notice to both teams.

We must be guided by Justice Jackson's exposition on due process in *Mullane*, 339 U.S. at 314: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to [be heard]."

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[14] Ark. Code Ann. §28-50-101(d) (2004, supp. 2009)(five years); Kan. Stat. Ann. §59-2239(1) (2000)(six months); Ky. Rev. Stat. Ann. §396.011(1) (LexisNexis 2010)(two years); R.I. Gen. Laws §33-13-4 (1995)(six years); Wyo. Stat. Ann. §§2-4-211 and 2-4-212 (1977)(two years).

Pope instructs that a known or reasonably ascertainable creditor of a decedent is entitled, under the Due Process Clause, to actual notice of the decedent's death, of the opening of a probate estate, and to the opportunity to be heard. *Pope*, 485 U.S. at 488-91. Requiring such notice would "not [be] so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted." *Pope*, 485 U.S. at 490.

So, the Missouri probate statute of repose, Section 473.444.1, violates the Due Process Clause of the Fourteenth Amendment, as applied to a known or reasonably ascertainable creditor, because it fails to require any notice, much less actual notice, of the decedent's death.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Canice Timothy Rice, Jr.
Counsel for Petitioner

February 2011

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Supreme Court of Missouri
en banc

STATE ex rel. GINA MARIE HOUSKA, PERSONAL REPRESENTATIVE OF THE ESTATE OF JEFFREY A. HOUSKA, DECEASED,	)	DUPLICATE OF FILING ON OCT X5 2010 IN OFFICE OF CLERK SUPREME COURT
Relator,	)	
v.	)	No. SC90701
THE HONORABLE RAY DICKHANER,	)	
Respondent.	)	

ORIGINAL PROCEEDING IN PROHIBITION

Opinion issued October 5, 2010

James T. Panagos, LLC completed work for Jeffrey Houska, but Houska died without paying Panagos. Panagos first brought his claim for payment against Houska's estate two-and-a-half-years later. The trial court held that the claim was barred under sections

473.444 and 473.360, RSMo 2000.[1] Panagos filed a motion for rehearing, which was granted to determine if section 473.444 violated Panagos' due process rights.

The estate seeks an order prohibiting the trial court from reinstating the claim Panagos asserted against it. This Court issued a preliminary writ of prohibition. Section 473.444 does not implicate due process because it is self-executing and does not constitute sufficient state action. The preliminary writ is made permanent.

I. Facts and Procedural History

In 2006, Panagos performed electrical contracting services and supplied electrical material for a home being built by Jeffrey Houska. Panagos furnished his invoice, in the amount of $1,498.75, to Houska on October 26, 2006. Houska died one week later, on November 2, 2006, without paying Panagos for his services. On May 11, 2007, the estate published letters of administration. Panagos brought a claim against the estate on May 5, 2009.

The trial court barred Panagos' claim under both sections 473.444 and 473.360,[2] which govern the time

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[1] All statutory references are to RSMo 2000 unless otherwise indicated.

[2] Section 473.360 provides that:

> all claims against the estate of a deceased person,...which are not filed in the probate division of the circuit court within six months after the date of the first published notice of

periods in which creditors may bring claims against estates. Panagos filed a motion for rehearing, which the trial court granted. The trial court reinstated Panagos' claim on the basis of *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), which held that an Oklahoma nonclaim statute violated creditors' due process rights because the trial court was intimately involved in the application of the time bar and the statute did not require the estate to give creditors actual notice. The trial court then set a hearing date to determine whether the standards in Pope had been met.

The estate petitioned this Court to prohibit the trial court from reinstating Panagos' claim, and a preliminary writ of prohibition issued. Panagos argues that section 473.444 violates due process because it bars most creditors' claims against an estate that are brought more than one year after a decedent's death and does not require the estate to give the creditors

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> letters testamentary or of administration or, if notice was actually mailed to, or served upon, such creditor, within two months after the date such notice was mailed, or served, whichever later occurs, or which are not paid by the personal representative, within six months after the first published notice of letters testamentary or of administration, are forever barred against the estate...

Because the estate concedes that Panagos may be entitled to actual notice under section 473.360, the rest of this Court's analysis focuses on the estate's argument regarding section 473.444.

actual notice of the probate proceedings.[3]

II. Standard of Review

A writ of prohibition is available: (1) to prevent a usurpation of judicial power when the trial court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted. *State ex rel. Missouri Public Defender Comm'n v. Pratte*, 298 S.W.3d 870, 880 (Mo. banc 2009). Prohibition may be appropriate to prevent unnecessary, inconvenient, and expensive litigation. *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 330 (Mo. banc 2009). Here, where the estate alleges that the trial court improperly reinstated Panagos' claim, a writ of prohibition is the appropriate remedy to prevent unnecessary and expensive litigation.

III. Analysis

A. Under *Pope*, Section 473.444 Is Self-Executing and Does Not Implicate Due Process Protections.

In response to the estate's writ, Panagos

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[3] Section 473.444 does not bar recovery of "costs and expenses of administration, exempt property, family allowance, homestead allowance, claims of the United States and claims of any taxing authority within the United States." Panagos' claim does not fall within any of the listed categories.

argues that section 473.444 violates the Due Process Clauses of the Missouri and United States Constitutions because the statute does not require actual notice to decedents' creditors. Section 473.444 provides:

> Unless otherwise barred by law, all claims against the estate of a deceased person, other than costs and expenses of administration, exempt property, family allowance, homestead allowance, claims of the United States and claims of any taxing authority within the United States,...***shall become unenforceable and shall be forever barred against the estate...one year following the date of the decedent's death***, whether or not administration of the decedent's estate is had or commenced within such one-year period and ***whether or not during such period a claimant has been given any notice, actual or constructive, of the decedent's death or of the need to file a claim in any court***.

(Emphasis added).

The Due Process Clause of the Fourteenth Amendment requires states to provide a party with notice that is "reasonably calculated ... to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Pope*, 485 U.S. at 484 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314. (1950)). "The Fourteenth Amendment protects this interest, however, only from deprivation by state action." Id. at

485 (emphasis added).

Panagos cites *Pope* in support of his contention that section 473.444 violates his right to due process by failing to require that the estate give him actual notice. In *Pope*, the Supreme Court considered an Oklahoma nonclaim statute that required the probate court to appoint an executor or executrix before notice was given to estates' creditors. *Id.* at 486. The notice triggered a two-month window in which creditors could bring claims against an estate. Id. Without court action – appointing the estate's executor or executrix – the two-month time bar would not be activated. The Supreme Court held that the "intimate involvement" of the state court constituted sufficient state action and implicated due process. *Id.*

The Oklahoma statute at issue in *Pope* was not self-executing. The Supreme Court expressly distinguished the applicability of the Due Process Clause to self-executing statutes of limitation. The Supreme Court explained that with a self-executing statute of limitation, the state has no role other than the enactment of the statute. *Id.* The Supreme Court clarified that the "[s]tate's limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause." *Id.* at 487.

In the present case, section 473.444 is self-executing. According to the Supreme Court's discussion of self-executing statutes in *Pope*, section 473.444 does not involve sufficient state involvement to implicate due process protections. As this Court has

previously noted, section 473.444 "operates independently of any notice, judicial action or jurisdiction of the probate division to bar claims." *Hatfield v. McCluney*, 893 S.W.2d 822, 827 (Mo. banc 1995). The trial court is not "intimately" involved with the application of the one-year limitation in section 473.444. No state action is required to trigger the one-year period; the decedent's death automatically triggers the time period. Because section 473.444 is self-executing, Panagos' due process claim fails.[4]

A one-year limitation is needed to promote the speedy and efficient settlement of estates. The state has an interest in "providing repose for potential defendants and in avoiding stale claims." *Pope*, 485 U.S. at 486. Section 473.444 facilitates prompt closure of estates and still gives creditors one full year to bring claims.

This Court's holding is consistent with other jurisdictions, which have unanimously held that *Pope* does not apply to self-executing statutes of limitation on creditors' claims that begin running at the time of the decedent's death. *In Re Estate of Ongara*, 998 P.2d 1097 (Colo. 2000); *Estate of Decker v. Farm Credit*

---

[4] Panagos also argues that section 473.444 violates the Due Process Clause of the Missouri Constitution. This Court has previously stated that Missouri's Due Process Clause "parallels its federal counterpart, and in the past this Court has treated the state and federal Due Process Clauses as equivalent." *Jamison v. State Division of Family Services*, 218 S.W.3d 399, 405 (Mo. banc 2007). Panagos fails to show that, in this case, the Due Process Clause in the Missouri Constitution should be construed more broadly than the Due Process Clause of the United States Constitution.

Services, 684 N.E.2d 1137 (Ind. 1997); *Ohio Casualty Insurance Co. v. Hallowell*, 617 A.2d 1134 (Md. App. 1993); *Burnett v. Villaneuve*, 685 N.E.2d 1103 (Ind. App. 1997); *Roddy v. Hamilton County Nursing Home*, 1999 Tenn. App. LEXIS 201 (Tenn. App. 1999); *Society Nat'l Bank v. Johnson*, 1997 Ohio App. LEXIS 5682 (Ohio App. 1997); *Fifth-Third Bank v. Gottlieb*, 1997 Ohio App. LEXIS 3815 (Ohio App. 1997).

B. Panagos Waived Additional Constitutional Claims.

In addition to his argument that section 473.444 violates creditors' due process rights, Panagos also argues in his brief before this Court that the statute (1) lacks clear title under article III, section 23 of the Missouri Constitution, and (2) violates the Equal Protection Clause under the Missouri and United States Constitutions. In Missouri, "[c]onstitutional challenges to the validity of any alleged right or defense asserted by a party to an action must be raised at the earliest opportunity consistent with good pleading and orderly procedure." *Litzinger v. Pulitzer Publishing Co.*, 356 S.W.2d 81, 88 (Mo. 1962); see *Eisel v. Midwest Bankcentre*, 230 S.W.3d 335 (Mo. banc 2007).

In writ proceedings, the parties may not always have an opportunity to raise all issues in the trial court. In such circumstances, waiver may not occur.

Here, however, Panagos had a full and fair opportunity to brief and argue all of his defenses to section 473.444. In his motion for rehearing, Panagos only argued that barring his claim violated his due

process rights. Panagos did not allege that section 473.444 lacked a clear title under article III of the Missouri Constitution or violated his equal protection rights. Panagos' failure to include these issues in his motion for rehearing, or to otherwise raise these additional constitutional issues, precluded the trial court from ruling on the allegations. Panagos waived these additional constitutional claims by not bringing them at the earliest opportunity.

IV. Conclusion

The preliminary writ of prohibition is made permanent.

s/ William Ray Price, Jr.
WILLIAM RAY PRICE, JR.,
CHIEF JUSTICE

All concur.

****

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICDE BOX 150
JEFFERSON CITY, MISSOURI
Thomas F. Simon
Clerk
65102
Telephone
(573) 751-4144

November 16, 2010

Mr. C. Timothy Rice
Suite 800
1221 Locust Street
St. Louis, MO 63103-2380

In Re: State ex rel. Gina Marie Houska, Personal Representative of the Estate of Jeffrey A. Houska, Deceased, Relator, vs. The Honorable Ray Dickhaner, Respondent.
Missouri Supreme Court No. SC90701
Jefferson County Circuit Court
No. 07JE-PR00004

Dear Mr. Rice:

Please be advised the Court issued the following order on this date in the above-entitled cause:

"Respondent's motion for rehearing overruled."

Very truly yours,

THOMAS F. SIMON

s/ Cynthia L. Turley
Cynthia L. Turley
Deputy Clerk, Court en Banc

cc:
Mr. Thomas J. Ray, Jr.
The Honorable Ray Dickhaner

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IN THE SUPREME COURT OF MISSOURI

STATE ex rel. GINA MARIE HOUSKA, PERSONAL REPRESENTATIVE OF THE ESTATE OF JEFFREY A. HOUSKA,	)	DUPLICATE OF FILING ON OCT 20 2010 IN OFFICE OF CLERK OF THE SUPREME COURT
Relator,	)	
vs.	)	No. SC90701
THE HONORABLE RAY DICKHANER,	)	Original Proceeding in Prohibition
Respondent.	)	

MOTION FOR REHEARING

Comes now Respondent, and pursuant to Rule 84.17(a)(1), moves for a rehearing. . . .

. . . .

2. **The Opinion Mischaracterizes Section 473.444 as a Statute of Limitation**

The opinion implies that Section 473.444 is a statute of limitation. **[Opinion, pp. 5-6]**. This is a mischaracterization of a statute that uses something other than the accrual of a cause of action to trigger a deadline for filing a claim. Had the opinion recognized that such a statute must be described as a statute of repose, its analysis would not have been confused by the *dicta* concerning self-executing statutes of

limitation found in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) or by the superficial analyses contained in the decisions of the courts of other states which it cites.

A correct analysis of the statute leads to a conclusion opposite that of the opinion: that the statute cannot fairly be described as self-executing. Rather, it is the action of the state in both enacting and enforcing this provision which, without notice to the creditor, cuts short the time that Panagos would otherwise have had, under the five or ten-year statutes of limitation, to enforce its contract rights. This state action implicates the right of due process.

Respectfully submitted,

s/ Canice Timothy Rice, Jr.

. . . .

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IN THE SUPREME COURT OF MISSOURI

STATE ex rel. GINA MARIE HOUSKA, PERSONAL REPRESENTATIVE OF THE ESTATE OF JEFFREY A. HOUSKA,	)	DUPLICATE OF FILING ON OCT 20 2010 IN OFFICE OF CLERK OF THE SUPREME COURT
Relator,	)	
vs.	)	No. SC90701
THE HONORABLE RAY DICKHANER,	)	Original Proceeding in Prohibition
Respondent.	)	

RESPONDENT'S SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING

. . . .

II. The Opinion Errs in Concluding That Section 473.444 Involves No State Action and, So, Is Immune From The Requirements of Due Process

A. The Opinion Mischaracterizes Section 473.444 as A Statute of Limitation Rather Than as A Statute of Repose

. . . .

B. The Opinion Fails to Acknowledge the Difference Between a Statute of Limitation, Where a Claimant Is Aware of the Facts That Gives Rise to the Claim, and this Probate Statute of Repose, Where the Claimant May Not Be Aware of The Death of the Debtor, the Fact Which Triggers the Start of the Nonclaim Period

. . . .

C. Pope's dicta Barely Illuminates The Due Process Analysis of A Statute of Repose

. . . .

So, taken together, the state's enactment of the probate statute of repose and its enforcement of the statute by denying a late-filed claim is state action. *Id.* at 451-52, 443-52.

D. The Policy Favoring the Prompt Closure of Estates Does Not Warrant Absolving the Personal Representative of Any Duty to Notify Creditors

The Opinion correctly notes that the state has an interest in the prompt disposition of decedents' estates. **[Opinion, p. 6]**. But, it fails to explain how the very modest requirement that a personal representative give a notice by mail to her decedent's known and reasonably ascertainable creditors, as *Pope* requires in order for a regular non-claim statute to

pass constitutional muster, unduly burdens that legitimate objective. While the Opinion observes that the statute "gives creditors one full year to bring claim," it neglects to note that some creditors may have several more years under the applicable statute of limitation to file suit and may not be aware of the fact of their debtor's death, a fact that the statute allows the personal representative to keep secret, the very fact that starts the clock on new deadline.

Respectfully submitted,

s/ Canice Timothy Rice, Jr.

. . . .

****

STATE OF MISSOURI)
) SS
COUNTY OF JEFFERSON)

IN THE CIRCUIT COURT OF THE
TWENTY-THIRD JUDICIAL CIRCUIT
OF MISSOURI AT HILLSBORO,
JEFFERSON COUNTY MISSOURI
PROBATE DIVISION

	)	FILED
	)	MAY 22 2009
In the Matter of the	)	HOWARD WAGNER
Estate of:	)	CIRCUIT CLERK
	)	
JEFFREY HOUSKA	)	Cause No. 07JE-PR00004J11
	)	
	)	

ORDER

On December 2, 2009, the Court called for Hearing a Motion for Rehearing of disallowed Claim or alternatively, to set aside the Court's Order dismissing the Claim as untimely. Argument was presented. The matter is taken under advisement.

The issue is controlled in part by the Supreme Court decision of Tulsa Professional Collection v. Pope, 485 U.S. 478 (1988). The question becomes whether the Administrator knew or by the use of reasonable diligence would have been aware that Claimant was a

creditor of the Estate[1]. Here, the only evidence before the Court is claimant's affidavit. It recites that certain work performed in the fall of 2006 was invoiced to decedent at an unspecified address. The invoice referenced work on Louie Drive. The affidavit contains the assertions that Decedent was a contractor and was constructing a home. A separate memorandum, not the affidavit, recites that the Personal Representative, son of decedent and also a resident of Arnold, knew of the decedent's construction project.

This Court retains Jurisdiction of the Estate because the administration has not been completed. The matters filed by Claimant at least raise the question of whether the standards applied in Pope have been met. The Order dismissing the claim is set aside. The Claim is reinstated. The parties are free to conduct such ever discovery as they chose, on the issues raised in the Pope case. The parties can set the claim for Hearing at such time as it is ready to be determined.

Nothing about this Order implies any determination has been made by the Court, only that claimant has a right to present it's (sic) best argument.

---

[1]There is discussion among authorities that both the Personal Representative and the Claimant have responsibility to protect their respective rights. Here, Claimant clearly had rights as Mechanic's Lien Claimant, as well as a collection matter, which he slept on for over 2½ years.

It is so Ordered the 21 day of December 2009.

s/ Ray Dickhaner

Ray Dickhaner
Division 11
Judge of the Probate Division

****

IN THE CIRCUIT COURT OF
THE COUNTY OF JEFFERSON
PROBATE DIVISION
STATE OF MISSOURI

	)	FILED
	)	OCT 19 2009
	)	HOWARD WAGNER
In the Estate of:	)	CIRCUIT CLERK
	)	
JEFFREY A. HOUSKA,	)	Estate No. 07JE-PR00004
	)	
Deceased.	)	

MOTION OF CREDITOR JAMES T. PANAGOS, LLC FOR REHEARING OF ITS CLAIM AGAINST THE ESTATE

Comes now creditor James T. Panagos, LLC, and moves this Honorable Court for rehearing of its claim against the estate and for the vacation or modification of this Court's order entered on May 22, 2009, dismissing this claim. As grounds for this motion, creditor James T. Panagos, LLC, states as follows:

1. Creditor James T. Panagos, LLC, ("Creditor") filed its claim on May 5, 2009, for labor and materials for electrical work performed on decedent's property on Louie Drive in Mystic Valley Estates seeking the recovery of the sum of $1,498.75.

2. On May 23, 2009, without notice to Creditor and without affording Creditor the opportunity to be heard, and apparently on the oral (sic) objection of the personal representative, this Court dismissed the

claim of James T. Panagos, LLC, stating that it was time barred by Sections 473.360 and 473.444 of the Revised Statutes of Missouri.

3. James T. Panagos, LLC, was a reasonably ascertainable creditor entitled to actual notice of the commencement of probate proceedings.

4. James T. Panagos did not receive such actual notice within the six month time limit for filing claims established by Section 473.360.

5. It would be a violation of James T. Panagos, LLC's due process rights to apply these statute's (sic) six-month time limit (sic) to bar the claim of James T. Panagos, LLC.

. . . .

****

IN THE CIRCUIT COURT OF THE
COUNTY OF JEFFERSON
PROBATE DIVISION
STATE OF MISSOURI

	)	FILED
	)	OCT 19 2009
	)	HOWARD WAGNER
In the Estate of:	)	CIRCUIT CLERK
	)	
JEFFREY A. HOUSKA,	)	Estate No. 07JE-PR00004
	)	
Deceased.	)	

MEMORANDUM TO (sic) SUPPORT
OF THE MOTION OF
CREDITOR JAMES T. PANAGOS, LLC
FOR REHEARING OF ITS CLAIM
AGAINST THE ESTATE

James T. Panagos, LLC ("Panagos") is an electrical contractor who supplied labor and material to decedent prior to his death at a home he was building . . . . Panagos billed decedent for this work but decedent failed to pay said bill. . . Based upon Panagos' billings and the personal representative's knowledge of decedent's construction project, Panagos was a reasonably ascertainable creditor entitled to actual notice that an estate had been opened. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988).

Nevertheless, the personal representative failed to give Panagos actual notice that an estate had been

opened. . . . Upon learning of the pendency of an estate, Panagos filed a claim. Without notice to Panagos and without any opportunity to be heard, apparently the personal representative presented her oral (sic) objection to Panagos' claim as untimely. . . .[T]he Court heard and granted this objection and dismissed the claim.

. . . .

Because Panagos was not afforded actual notice of the opening of this estate, it has been deprived of its rights to due process, as guaranteed under the Constitutions of the United States and of the State of Missouri.

. . . .

****

IN THE CIRCUIT COURT OF THE
COUNTY OF JEFFERSON
PROBATE DIVISION
STATE OF MISSOURI

	)	FILED
	)	OCT 19 2009
	)	HOWARD WAGNER
In the Estate of:	)	CIRCUIT CLERK
	)	
JEFFREY A. HOUSKA,	)	Estate No. 07JE-PR00004
	)	
Deceased.	)	

AFFIDAVIT OF JAMES T. PANAGOS

Comes now James T. Panagos, upon his oath, duly sworn, states as follows:

. . . .

3. In or about the fall of the year 2006, James T. Panagos, LLC performed electrical contracting services and supplied electrical material for a home which decedent was constructing on Louie Drive in Mystic Valley Estates.

4. Decedent was the general contractor for the construction of this job.

5. James T. Panagos, LLC furnished an invoice, dated October 26, 2006, a copy of which is attached hereto as "Exhibit A," and incorporated by reference, directly to decedent for the work performed.

6. Decedent failed to pay such invoice.

7. At no time did I or did James T. Panagos, LLC receive notice of any kind from the personal representative of the Jeffrey Houska Estate that Jeffrey Houska had died.

8. At no time did I or did James T. Panagos, LLC receive notice of any kind from the personal representative of the Jeffrey Houska Estate that a probate estate had been opened and that James T. Panagos, LLC had an opportunity to present its claim in probate.

Further, Affiant sayeth not.

s/ James T. Panagos
James T. Panagos

. . . .

****

STATE OF MISSOURI)
) SS
COUNTY OF JEFFERSON)

IN THE CIRCUIT COURT OF THE
TWENTY-THIRD JUDICIAL CIRCUIT
OF MISSOURI AT HILLSBORO,
JEFFERSON COUNTY MISSOURI
PROBATE DIVISION

	)	FILED
	)	MAY 22 2009
In the Matter of the	)	HOWARD WAGNER
Estate of:	)	CIRCUIT CLERK
	)	
JEFFREY HOUSKA	)	Cause No. 07JE-PR00004J11
	)	

ORDER

Personal Representative objects to the claim of James T. Panagos, L.L.C. as being untimely. The Claim is time barred by both 473.360 and 473.444. The Claim is Ordered dismissed.

It is so Ordered this 22 day of May, 2009.

s/ Ray Dickhaner
Ray Dickhaner
Division 11
Judge of the Probate Division

****

Selected Probate Division docket entry:

05/20/2009

Docket Entry:	Motion Filed
Text:	MOTION TO DISMISS CLAIM OF JAMES T. PANAGOS, L.L.C.
Filing Party:	RAY, THOMAS JERRELL JR

****

IN THE CIRCUIT COURT OF THE
COUNTY OF JEFFERSON
PROBATE DIVISION
STATE OF MISSOURI

	)	FILED
	)	MAY 05 2009
	)	HOWARD WAGNER
In the Estate of:	)	CIRCUIT CLERK
	)	
JEFFREY A. HOUSKA,	)	Estate No. 07JE-PR00004
	)	
Deceased.	)	

CLAIM AGAINST THE ESTATE
(Sections 473.380 & 475.205)

Claim of James T. Panagos, LLC, Creditor

(itemize accounts, showing dates and charges)

Date	Description of Charges	Amount
10/26/2006	Labor and material for electrical work performed on Louie Drive in Mystic Valley Estates	$1,498.75

The claimant holds an unsecured claim.

Claimant states that to the best of his knowledge and belief, credits have been given to the estate for all payments and offsets to which it is entitled and that the balance here claimed is justly due.

Affiant is the claimant.

Claimant is a limited liability company.

The foregoing statement is made under oath and is true and correct to my best knowledge and belief, subject to the penalties of making a false affidavit or declaration.

s/ James T. Panagos
James T. Panagos,
Manager

6330 Highway 61-67
P.O. Box 470
Imperial, MO 63052

(Claimant's invoice attached
and incorporated by reference)

Invoice

JAMES T. PANAGOS, LLC
6330 HWY 61-67
P.O. Box 470
Imperial, MO 63052
Phone (636-464-7111)

Date	Invoice #
10/26/2006	15951

BILL TO
JEFF HOUSKA

SHIP TO
JEFF HOUSKA

P.O. Number	TERMS	JOB NO.	JOB NAME
	Net 15 days	13592-1	Louie Drive

Quantity	Description	Each	Amount
1.00	Labor & material for 25% of base bid for electrical rough-in	998.75	998.75
2.00	Wire & install (2) extra ceiling fans	250.00	500.00
	Total		$1,4908.75

****

Missouri Revised Statutes (2000)
Chapter 473
Probate Code – Administration of Decedents' Estates

Notice of letters – duty of clerk – publication – form.

473.033. The clerk, as soon as letters testamentary or of administration are issued, shall cause to be published in some newspaper a notice of the appointment of the personal representative in which shall be included a notice to creditors of the decedent to file their claims in the court or be forever barred. The notice shall be published once a week for four consecutive weeks. The clerk shall send a copy of the notice by ordinary mail to each heir and devisee whose name and address are (sic) shown on the application for letters or other records of the court. . . . The personal representative may, but is not required to, send a copy of the notice by ordinary mail or personal service to any creditor of the decedent whose claim has not been paid, allowed or disallowed as provided by Section 473.403. . . . The notice shall be in substantially the following form:

To all persons interested in the estate of ....., decedent:

On the ..... day of ....., 20..... (the last will of the decedent having been admitted to probate) ..... was appointed the personal representative of the estate of ....., decedent, by the probate division of the circuit court ..... County.

Missouri. The business address of the personal representative is ....., and the personal representative's attorney is ..... of ..... .

All creditors of the decedent are notified to file claims in court within six months from the date of first publication of this notice or if a copy of this notice is mailed to, or served upon, such creditor by the personal representative, then within two months from the date it was mailed or served, whichever is later, or be forever barred to the fullest extent permissible by law. Such six-month period and such two-month period do not extend the limitation period that would bar claims one year after the decedent's death, as provided in section 473.444, RSMo, or any other applicable limitation periods. . . .

. . . .

Date of the decedent's death was ....., 20.....

Date of first publication is ....., 20.....

.....
Clerk of the Probate Division
of the Circuit Court
..... County, Missouri

****

Limitations on filing claims – when claims barred.

473.360.1. . . . [A]ll claims against the estate of a deceased person . . . which are not filed in the probate division of the circuit court within six months after the date of the first published notice of letters testamentary or of administration or, if notice was actually mailed to, or served upon, such creditor, within two months after the date such notice was mailed, or served, whichever later occurs, . . . are forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent. . . .

. . . .